

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.51 of 1997

Reserved on: October 10, 2007

Decided on: November 15, 2007.

Bachittar Singh & Ors.

.....Appellants.

VERSUS

Barfi Devi

.....Respondent.

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?¹ No

For the Appellants: Mr.K.D.Batish, Advocate.

For the Respondent: Mr.Anand Sharma, Advocate.

Kuldip Singh, Judge

This appeal has been filed by appellants / defendants against the judgment, decree dated 18.9.1996 passed by learned District Judge, Hamirpur in Civil Appeal No.40 of 1990 maintaining the judgment, decree dated 9.1.1990 passed by learned Sub Judge 1st Class(2), Hamirpur in Civil Suit No.35 of 1986.

2. The facts, in brief, are that respondent / plaintiff filed a suit for declaration and permanent prohibitory injunction to the effect that she is owner in possession of suit land more specifically detailed in plaint vide Jamabandi 1979-80 situated in Tika Duhak, Tappa Spahal, Sub Tehsil Sujanpur, District Hamirpur after the death of her

¹ *Whether the reporters of the local papers may be allowed to see the Judgment? yes*

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father Galifa, mutations No.301 and 302 attested on 21.3.1985 on the basis of alleged Will dated 15.9.1984 of Galifa as well as alleged Will dated 9.10.1984 of Khazana are null and void. In the alternative, her suit is for possession.

3. The further facts are that Galifa was real brother of Khazana who died intestate on 22.7.1962, his estate was mutated in the name of Galifa vide mutation No.208 dated 22.10.1963. Galifa was owner in possession of the suit land and he died on 11.7.1977. After the death of Galifa respondent Barfi is coming in possession of the suit land. The appellants by mis-representation, fraudulently got executed forged Wills after the death of Khazana and Galifa in order to grab the suit land and thus got mutations No.301 and 302 attested in their favour on 21.3.1985 on the basis of alleged Wills of Galifa and Khazana.

4. The appellants contested the suit on the grounds of maintainability, locus-standi, non joinder of necessary parties, valuation, limitation and estoppel. It has been alleged that Galifa left behind his widow Smt.Kehro Devi who is alive and residing with appellants. The possession of the suit land is claimed by appellants. They have pleaded that Galifa had executed gift deed dated 6.12.1966 in their favour. The mutations on the basis of gift were rightly attested in their favour. In replication, respondent Barfi contested the defence put forward by appellants. The learned trial Court returned the finding on gift deed dated 6.12.1966 against appellants. The suit was

decreed on 9.1.1990. The respondent Barfi was declared owner in possession of the suit land and appellants were directed not to interfere in her possession on the suit land. The appellants filed an appeal against the decision dated 9.1.1990 which has been dismissed on 18.9.1996 by learned District Judge, Hamirpur. Hence, appellants / defendants are in second appeal in this Court.

5. The appeal has been admitted on the following substantial questions of law:-

- i) *Can a suit for permanent injunction be decided without framing the issue of possession of the suit land?*
- ii) *Has the non-framing of the issue of possession vitiated the trial and the case is liable to be remanded on this score?*
- iii) *What is the effect of non-impleadment of second wife who has been admitted to be his wife by the donor in the validly executed gift deed in favour of the appellants?*
- iv) *Can the suit be decreed in view of the reversal of finding on issue No.7?*
- v) *Whether there has been continuous mis-appreciation of evidence which has resulted in grave injustice?*
- vi) *When the donor gifts away all his immovable properties along with*

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constructed residential house through a validly executed gift deed to the donee in 1966, can the legal heir of the donor be held in possession of the property in the year 1990?

6. I have heard the learned counsel for the parties and gone through the record. Mr.K.D.Batish, learned counsel for the appellants, has submitted that the appellants are owners in possession of the suit land on the basis of gift deed Ext.D-1 executed by Galifa in favour of Amar Singh, Bhag Singh, Chand and Bachittar Singh. The Courts below have erred in decreeing the suit of the respondent, no proper issues were framed, the suit is bad for want of necessary parties, viz., Smt.Kehro Devi wife of Galifa, the findings on Issue No.7 of trial Court were reversed by lower appellate Court, therefore, the impugned judgment and decree are not sustainable, the evidence has not been properly appreciated. The impugned judgment and decree are thus liable to be set aside. Mr.Anand Sharma, learned counsel for the respondent, has supported the impugned judgment and decree. He has submitted that as per appellants, Smt.Kehro Devi, the alleged wife of Galifa, is living with them but they did not examine her in the case, therefore, adverse inference is to be drawn against them.

SUBSTANTIAL QUESTIONS OF LAW NO.1 & 2:

7. The trial Court has framed following Issue No.1:-

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“Whether the plaintiff is entitled for the decree of declaration with consequential relief of permanent injunction as prayed for? OPP”

The grievance of the appellants is that the trial Court has not framed specific issue of possession of respondent / plaintiff on the suit land and in absence of such issue the decree of permanent prohibitory injunction could not have been passed. The perusal of issue framed by the trial Court would show that it covers declaration as well as permanent injunction as prayed by the respondent / plaintiff regarding the suit land. In a suit for permanent prohibitory injunction, the first ingredient which is required to be proved by the plaintiff is the possession. The trial Court has framed wider issue No.1 under which respondent / plaintiff was required to prove her title and possession on the suit land. The parties were aware of the nature of controversy, they led evidence accordingly and, therefore, in second appeal it is too late for the appellants to raise grievance that the issue of possession was not framed by the trial Court. It has not been shown what prejudice has been caused to appellants in absence of issue as claimed by them. In the grounds of appeal before the lower appellate Court, the appellants herein have not taken ground of non framing of issue of possession specifically. There is no merit in the contention of the learned counsel for the appellants that in absence of specific issue of possession of respondent / plaintiff on the suit land the trial has

vitiated. The substantial questions of law No.1 and 2 are accordingly decided against the appellants and in favour of the respondent.

SUBSTANTIAL QUESTION OF LAW NO.3:

8. The respondent / plaintiff has filed the suit that she being the daughter of Galifa is entitled to inherit his estate including the suit land and after the death of Galifa she is owner in possession of the suit land. The defence of the appellants is that they are owners in possession of the suit land on the basis of gift deed dated 6.12.1966 executed by Galifa in favour of Amar Singh, Bhag Singh, Chand and Bachittar Singh regarding the suit land. It is not their defence that Smt.Kehro Devi is owner of the suit land. The learned counsel for the appellants has contended that even if gift deed dated 6.12.1966 is ignored for the time being in that case also Smt.Kehro Devi being the widow of Galifa has right to inherit the property of Galifa along with respondent / plaintiff and since Smt.Kehro Devi has not been impleaded as party in the case, therefore, the suit is not maintainable. DW-1 Amar Singh has stated that Smt.Kehro Devi has been residing with him for the last 23-24 years. In view of the defence of the appellants it can be safely inferred that they must have disclosed the institution of the suit to Smt.Kehro Devi but she opted not to file an application for impleadment as party in the suit. She was not produced as a witness in the case by the appellants, therefore, adverse inference is to be drawn against the appellants. The appellants as per the case of respondent are strangers to the suit land

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and she has every right to protect her property from the strangers. The lower appellate Court has recorded a finding of fact that Smt.Kehro Devi has not been proved to be the widow of Galifa. To the same effect is the finding recorded by trial Court that Smt.Kehro Devi is not the widow of Galifa. This finding of fact cannot be interfered in second appeal. The suit is thus not bad for impleading Smt.Kehro Devi. The substantial question of law No.3 is decided against the appellants.

SUBSTANTIAL QUESTIONS OF LAW NO.4, 5 & 6:

9. The substantial questions of law No.4, 5 and 6 are interconnected and, therefore, these are being disposed of collectively. The appellants in Paragraph-2 of their written statement have admitted respondent / plaintiff to be the daughter of Galifa. They have admitted the death of Khazana and Galifa. They have claimed the suit property on the basis of gift deed dated 6.12.1966 Ext.D-1 executed by Galifa in their favour. The respondent has denied the execution of gift deed of suit land by Galifa in favour of appellants. The perusal of gift deed Ext.D-1 would show that Khasra numbers have not been mentioned in the gift deed. The respondent in the plaint has given the Khasra numbers as per Jamabandi 1979-80. The appellants have not connected the land mentioned in the gift deed Ext.D-1 with the suit land. The gift deed Ext.D-1 was allegedly executed on 6.12.1966 in favour of Amar Singh, Bhag Singh, Chand and Bachittar Singh but surprisingly no mutation on the basis of gift deed Ext.D-1 has been

attested in favour of Amar Singh, Bhag Singh, Chand and Bachittar Singh. It appears gift deed Ext.D-1 was not acted upon, no explanation has been given why mutation on the basis of gift deed Ext.D-1 was not attested in favour of Amar Singh, Bhag Singh, Chand and Bachittar Singh and why the factum of gift deed was not reported to the Patwari Halqua or other revenue authority for making necessary entries in favour of Amar Singh, Bhag Singh, Chand and Bachittar Singh on the basis of gift deed Ext.D-1. This is in addition to the fact that suit land has not been linked by appellants with the land covered by gift deed Ext.D-1.

10. The mutation No.301 dated 21.3.1985 Ext.P-5 has been attested in favour of Bachittar Singh etc. regarding the estate of Khazana. Similarly, mutation No.302 dated 21.3.1985 Ext.P-4 has been attested in favour of Bachittar Singh etc. regarding the estate of Galifa. Bachittar Singh etc. were present at the time of attestation of mutations No.301 and 302 and they never pointed out that Galifa has executed gift deed of the suit land in their favour and, therefore, they are entitled to the estate of Galifa on the basis of gift deed Ext.D-1. This conduct of Bachittar etc. further proves that the gift deed Ext.D-1 was not acted upon.

11. Khazana had died long time back and learned District Judge has recorded a specific finding that on the death of Khazana his property was inherited by Galifa vide mutation No.208 Ext.P-6 attested on 22.10.1963 and Galifa has died on 11.7.1977. In mutation No.301

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date of death of Khazana has been mentioned 20.9.1984 and in mutation No.302 date of death of Galifa has been mentioned 15.10.1984. Similarly, in mutation No.301 reference of Will dated 15.9.1984 has been given and in mutation No.302 reference of Will dated 9.10.1984 has been given. The mutation numbers 301 and 302 regarding the dates of deaths of Khazana and Galifa are contrary to other record such as mutation No.208 Ext.P-6 regarding the estate of Khazana which was attested on 22.10.1963 in favour of Galifa. As per Ext.P-7 death certificate, Galifa has died on 11.7.1977. Therefore, dates of deaths of Khazana and Galifa in mutation No.301 and 302 respectively are wrong. Khazana and Galifa died much before the dates of Wills mentioned in mutation Nos.301 and 302, nor such Wills have been proved on record, therefore, mutation No.301 Ext.P-5 and mutation No.302 Ext.P-4 have been wrongly attested in favour of Bachittar etc. on the basis of Wills of Khazana and Galifa respectively. The two Courts below have rightly appreciated the material on record. No case for interference has been made out. The substantial questions of law No.4, 5 and 6 are decided against the appellants and in favour of the respondent.

12. No other point was urged.

13. The result of the above discussion, the appeal fails and is dismissed accordingly. No costs.

November 15, 2007.
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(Kuldip Singh)
Judge

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